United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2168

TO BE ARGUED BY
WILLIAM B. GRAY

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE VERMONT NATURAL RESOURCES COUNCIL, INC.; CATHERINE BEATTIE, Individually and as a member of the VERMONT NATURAL RESOURCES COUNCIL, INC.; CITIZENS ASKING FOR RECONSIDERATION OF ROUTE 2; and LESLIE A. PARKER, Individually and as a member of CITIZENS ASKING FOR RECONSIDERATION OF ROUTE 2,

Plaintiffs-Appellants

v.

CLAUDE S. BRINEGAR, Secretary of Transportation, DAVID B. KELLEY, Division Engineer, Federal Highway Administration; H. JAMES WALLACE, FRANK S. BALCH, HENRY O. ANGELL, ROBERT S. BIGELOW, and WILLIAM COSTA, in their capacities as members of THE VERMONT STATE HIGHWAY BOARD; and JOHN T. GRAY, Commissioner of Highways, State of Vermont,

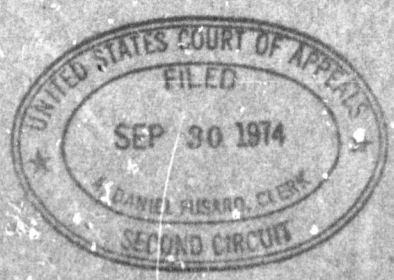
Defendant-Appellees

TOWN OF ST. JOHNSBURY,

Defendant-Intervenor

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

BRIEF FOR THE FEDERAL DEFENDANT-APPELLEES



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ISSUES PRESENTED

1. Whether an otherwise adequate environmental impact statement prepared by the Vermont Highway Department under the direction, guidance and specifications of the

Federal Highway Administration and later reviewed, revised, and adopted by the Federal Highway Administration constitutes a "detailed statement by the responsible official" within the meaning of Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. §4332(2)(C).

2. Whether the District Court properly declined to issue an injunction when it found that the EIS failed to consider an alternative which was "a very remote possibility" and not "provident or feasible."

3. Whether (a) an alleged violation of Sections 10 and 13 of the River and Harbor Act of 1899 afford a basis for injunctive relief in an action brought by an environmental group and private citizens and (b) failure to give the 60-day notice required by Section 505 of the Federal Water Pollution Control Act Amendments of 1972 precludes the injunctive relief sought.

STATEMENT OF THE CASE

I. PRELIMINARY STATEMENT

Plaintiffs appeal from the Findings of Fact, Conclusions of Law and Opinion entered August 21, 1974, by the Honorable Albert W. Coffrin, United States District Judge, after a five-day non-jury trial. In the Findings of Fact, Conclusions of Law and Opinion, and the Judgment Order

dated August 16, 1974, which preceded it, the District Court granted plaintiffs' request for an injunction as it related to certain highway projects and denied the request for an injunction, entering judgment for the defendants, with respect to a proposed Route 2 interchange with Interstate Highway 91 (Interstate 91), west of St. Johnsbury, Vermont. Plaintiffs' request for a stay pending appeal was denied by the District Court on August 19, 1974, at which time notice of appeal to this Court was filed. On August 20, 1974, plaintiffs renewed their request for a stay pending appeal before the Honorable James L. Oakes, United States Circuit Judge, in Brattleboro, Vermont. On August 21, 1974, Judge Oakes granted a partial and temporary stay until August 26, when the request for a stay pending appeal was heard by a three-judge panel of this Court, but Judge Oakes indicated that the stay prohibited only those construction projects which related directly to the channelization of the Sleepers River. On August 26, 1974, a three-judge panel of this Court, composed of the Honorable Paul R. Hayes, the Honorable Walter R. Mansfield, and the Honorable Murray I. Gurfein, United States Circuit Judge

heard argument on the request for a stay pending appeal, continued the stay as entered by Judge Oakes and accelerated the appeal to September 18, 1974.

II. PRIOR PROCEEDINGS

The complaint herein was filed on June 17, 1974, and was thereafter served upon the Federal defendants and upon the United States Attorney's office. The complaint was accompanied by a motion for a temporary restraining order on which motion argument was heard by the Honorable Albert W. Coffrin, United States District Judge, on June 17 and June 21, 1974. On June 21, 1974, a temporary restraining order was granted as to all projects except I-91-3(b), F-028-4(4) and F-028-4(3), the projects which related to the construction of an interchange in the vicinity of the Sleepers River designed to connect the newly constructed Interstate 91 with a relocated U.S. Route 2. In accordance with Rule 65(a)(2), Federal Rules of Civil Procedure, the hearing on the application for a preliminary injunction and the trial on the merits were consolidated and between July 2 and July 10, 1974, the District Court received evidence. On August 2, 1974, approximately three weeks after the close of evidence, plaintiffs reapplied to the District Court for a temporary restraining order with respect to the Sleepers River

interchange projects, and after a hearing, the District Court restrained construction of the Sleepers River projects for two weeks, not upon the basis of the National Environmental Policy Act (NEPA), 42 U.S.C. §4332(2)(c), but upon the then unresolved question of whether the defendants had violated either the Federal Water Pollution Control Act, (FWPCA) 33 U.S.C. §1344, or the Rivers and Harbors Act of 1899, 33 U.S.C. §403. On August 16, 1974, when the temporary restraining order of August 2 lapsed, the District Court issued a judgment order in which the application for preliminary and permanent injunction as to the Sleepers River interchange projects was denied and construction was permitted to go forward. The District Court continued the injunction against the adjacent projects pending further order of the court.

III. THE DISTRICT COURT'S DECISION

As it relates to the issues raised on appeal, the District Court's decision held as follows:

A. The EIS, prepared pursuant to the specifications of PPM 90-1, and under the direction, guidance, supervision, editing and participation of FHWA, constituted a "detailed statement by the responsible official" within the meaning of §102(2)(c) of the National Environmental Policy Act, 42 U.S.C. §§4321 - 47;

B. The EIS, which was prepared in good faith and represented a good faith consideration of the environmental factors but which did not consider an alternative to the construction of the Route 2 interchange which was "a very remote possibility" and not "provident or feasible", did not require the issuance of an injunction, based upon a full weighing of all the equities;

C. The plaintiffs have not complied with the citizen's suit provisions of the Federal Water Pollution Control Act, 33 U.S.C. §1365. 1/

IV. FACTS

A. Background

The proposed highway construction which is the subject of this appeal is to be located just west of the village of St. Johnsbury, Vermont, in Caledonia County, in what is known as the Northeast Kingdom area of Vermont. St. Johnsbury, the county seat for Caledonia County, is

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1/ The District Court found it unnecessary to reach the issue whether the Sleepers River was a navigable water within the meaning of the Federal Water Pollution Control Act, 33 U.S.C. §1362(7) or whether the definition contained therein was constitutional.

the only urban area of any significance and contains approximately 37% (8409) of the county's total population of approximately 22,800 people (EIS .12 - 13).[2/]

The principal construction proposed in the EIS is the completion of Interstate 91 which bypasses the St. Johnsbury urban area. Interstate 91 is now open to traffic from New Haven, Connecticut, to Bradford, Vermont, approximately 15 miles south of St. Johnsbury. It is also completed from the town of Lyndon, 5 miles north of St. Johnsbury to the Canadian border. Within the State of Vermont, Interstate 91 parallels the existing U.S. 5 on the eastern border of the state, primarily in the Connecticut River Valley. At present, northbound traffic using Interstate 91 now leaves this modern limited access facility onto a grossly inadequate, outdated U.S. Route 5 which channels all the northbound thru traffic into the

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[2/] The designation EIS refers to the Environmental Impact Statement filed in connection with the proposed construction; other designations include Op. for the Court's Opinion, PX and DX for Plaintiff's and Defendant's Exhibits, respectively, and Tr. to the transcript of the hearings held in this case, when available. Because the transcript has not yet been completed, this statement of facts is based primarily upon the District Court's Opinion and counsel's recollection of the facts. Whenever possible, specific references are given.

village of St. Johnsbury. Similarly, U.S. Route 2, a major east-west federal aid primary highway from Montpelier, Vermont, to Portland, Maine, also funnels all its thru traffic into the village of St. Johnsbury. The projects which the District Court refused to enjoin, and which are the subject matter of this appeal, constitute the proposed construction of an interchange between Interstate 91 and U.S. Route 2 slightly north of the existing alignment of Route 2 in the vicinity of the Sleepers River, northwest of the village of St. Johnsbury. No other aspect of proposed Interstate 91 is challenged by the plaintiffs, but the proof at the hearing showed that if the Route 2 or Sleepers River interchange is not constructed, it will be impossible to build the remainder of Interstate 91 without further public hearings, corridor studies and, quite probably, further District Court litigation. Accordingly, an injunction restraining the construction of the Sleepers River interchange is quite likely to delay the completion of Interstate 91 for several years. On the basis of the presently projected construction schedule, completion of Interstate 91 around St. Johnsbury will be accomplished by the summer of 1976, at which time the summer Olympic games will be held in Montreal, Quebec, Canada. Based upon traffic studies

conducted during the summer of 1967, with respect to the World's Fair called Expo '67 in Montreal, St. Johnsbury can anticipate significant traffic difficulties unless Interstate 91 is completed before the summer of 1976. In addition, the delay of the construction by as much as one year will call for the renegotiation of the construction contract between the State of Vermont and the private construction company resulting in a likely increase in costs of approximately 9% of the $10 million dollar contract or approximately $900,000. Because the proposed construction is financed 90% by the Federal Highway Administration (FHWA), most of this additional cost will be borne by the federal taxpayer.

B. Preparation of the EIS

The final EIS in this case covers the construction of a portion of Interstate 91 and the Sleepers River interchange, together with the proposed 4.3 mile relocation of Route 2. On the basis of the evidence at the trial, the District Court found that in preparing the EIS in this matter, the Vermont Highway Department faithfully followed the mandate of the revised Policy and Procedure Memorandum (PPM) 90-1, dated September 7, 1972, which sets forth guidelines for the preparation of environmental impact statements. Basically, PPM 90-1 provides for coordination

between the public, local, state and federal agencies in making an environmental assessment through a systematic, interdisciplinary approach in consultation with FHWA. It provides that the appropriate "highway agency" (here VHD) is to prepare a draft environmental impact statement in cooperation with FHWA consulting such other local, state or federal agencies as either VHD or FHWA considers to have specific expertise in determining the significance of the impact which the involved project is likely to have on the environment, and thereafter circulating the draft EIS to local, state and federal agencies for comment. In addition, the draft EIS has to be made available to the public well in advance of such public hearing or hearings as are also required. The next step is the preparation of the final EIS by VHD which includes, among other things, all comments which have been made with reference to the draft EIS together with the response of VHD to such comments. Thereafter, review and adoption of the final EIS is made by the Regional Federal Highway Administration office following a prescribed procedure set forth in PPM 90-1.

The District Court found that both the draft and final EIS in this instance were prepared by an "Interdisciplinary Team" of VHD pursuant to PPM 90-1. It is largely written by Arthur Aldrich, the VHD Location

Engineer,working directly under the supervision of Arthur J. Goss, the Department's Assistant Planning Engineer. In preparing the EIS, various studies, reports and plans, some of which antedated the effective date of NEPA, were utilized in considering the impact of the project on the human environment. Additional studies, including site examinations, were made by certain members of the Interdisciplinary Team specifically in connection with the preparation of the draft EIS. (Op. 7)

Throughout the course of the preparation of the draft and final EIS, Mr. Aldrich was in practically daily consultation with Gordon Hoxie, Engineering Coordinator of the Vermont office of FHWA. Each such contact did not necessarily pertain to preparation of the EIS but frequently did. Hoxie worked directly under defendant Kelley, Division Engineer of the Vermont office of the FHWA. In addition to the extensive contact which Hoxie maintained with VHD, Kelley and other staff members of his office reviewed and commented, often in writing, upon various aspects of the draft and final EIS, during their preparation. These comments were communicated to VHD either orally or in writing. (DX. A) Both Hoxie and Kelley attended meetings involved with the overall preparation of the EIS. Although FHWA's Vermont office did not

conduct any independent on-the-scene environmental studies or analysis[3/] of the project, various members of the FHWA office did spend time in the field at the project site but such visits were not specifically in connection with the preparation of the EIS. Although neither Kelley, Hoxie or any members of their staff literally wrote any part of the EIS, both the draft and final versions had been completely reviewed and approved by them and contained a great deal of input from FHWA. (Op. 8)

After its preparation, the draft EIS was circulated and made available to the public, interested agencies and groups for their comments as required by PPM 90-1. The final EIS contained the required responses to the comments received. The FHWA participated through Hoxie in the preparation of the responses made by the State Highway Department and, following its review, the Vermont office of FHWA forwarded the draft EIS to its regional office in Delmar, New York, where it was examined by Donato J. Altobelli, at that time Director of the Office of Environment and Design. Mr. Altobelli circulated the draft for review to eight of the ten members of his staff who comprised a "Multi-Disciplinary Environmental Task Group" organized for this purpose. Included in this

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[3/] FHWA relied on the facts and studies collected by VHD; it did, however, conduct an analysis of the overall environmental impact of the project, both at the time the EIS was approved and adopted and, more important, in June 1974, when it committed federal funds to the project.

task group were a civil engineer with a masters degree in hydraulics, specializing in water pollution, hydraulics, soil erosion and noise; an "Environmentalist" specializing in environmental wildlife, ecology and pollution; a lawyer specializing in environmental law; a civil engineer specializing in soils, materials and construction procedures; a real estate specialist involved with relocation and community impact; a landscape architect specializing in aesthetics, terrain and general water pollution; a civil engineer involved with air pollution; a civil engineer primarily concerned with compliance with regulations, paper work and the like; a structural engineer; and an urban planner. Mr. Altobelli did not include himself in the group but he was involved in group meetings and discussions. All of the members of the task group were involved with this matter except the urban planner who deals primarily with large urban areas (which admittedly the St. Johnsbury project is not) and the structural engineer who was not consulted because the nature of the project was such that consultation with the hydraulics engineer was sufficient. Each member of the task group made detailed comments respecting the draft EIS which were summarized in a memorandum forwarded to defendant Kelley on July 31, 1973. (DX. B) These comments, eight in number,

were made known by Kelley to VHD and in general were incorporated in the final EIS. The final EIS was transmitted from the Vermont FHWA office to the Regional FHWA office under date of February 1, 1974. It was reviewed, approved and adopted by the FHWA on February 22, 1974. On April 8, 1974, the final EIS was forwarded to the Council on Environmental Quality and, thereafter, upon the lapse of 30 days as required by 40 C.F.R. §6.15(1973), bids for the construction of the Sleepers River interchange were solicited by VHD. (Op. 9)

C. The Consideration of Alternatives

The EIS considers several alternative alignments for the proposed construction of Interstate 91 from Ryegate to Lyndon. The alternative chosen for construction was carefully selected from among the other alternatives and the basis for the selection is well established in the EIS (pp. 6-10). Appellants argue, however, that the EIS fails adequately to consider alternatives to the proposed location of the Route 2 interchange[4/] in the vicinity of the Sleepers River. At the trial below, plaintiffs suggested essentially two alternatives to the interchange: First, a "do nothing" approach which would make use of the existing streets in St. Johnsbury village to conduct U.S. Route 2 traffic through

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[4/] The Sleepers River interchange with Route 2 is one of six covered by the EIS project description (EIS, p. 1).

the village to existing U.S. Route 5, a narrow and curving highway, whereafter a short distance Interstate 91 could be entered via the Route 5 interchange south of St. Johnsbury (Op. 17); secondly, the construction of a highway running from the existing Route 2 southerly and immediately parallel to either the northbound or southbound lane of Interstate 91 to the U.S. Route 5 interchange. On the basis of the evidence adduced at trial, the information contained in the EIS, and its own evaluation of the relevant criteria, the District Court found that neither of plaintiffs' suggestions constituted a "viable alternative to the Sleepers River interchange." (Op. 18) In addition to the traffic reasons for rejecting these two alternatives, set forth in the District Court's Opinion (Op. 18-20), the proof at trial showed that the steep hillsides in the area of the intersection of Interstate 91 with the existing Route 2 precluded the construction of an interchange in that area. Accordingly, on the basis of all the evidence, the only possible location for a Route 2 interchange, which interchange the District Court found was a necessity (Op. 35), is in the vicinity of the Sleepers River, as presently proposed.

D. The Sleepers River

The proof at trial demonstrated that the Sleepers River is a small, meandering stream which is a tributary of the Passumpsic River, which in turn is a tributary of the upper Connecticut River. There was absolutely no proof at trial that the Sleepers River was navigable or had ever been navigable. Indeed, much of the evidence adduced with respect to its qualities as a fish habitat indicated that, particularly in the summertime when the water was low, there was a grave danger that the stream would be too small and too shallow to sustain the life of trout, except where deep pools existed or were constructed. The proof at trial, including the photographs introduced, indicated that the Sleepers River was not navigable, except perhaps by canoes during the high waters of the spring run-off. The proposed location of the Route 2 interchange is in the vicinity of the Sleepers River approximately four miles upstream from the point it flows into the Passumpsic River. The confluence of the Sleepers and Passumpsic Rivers takes place at a point approximately 10 miles from the upper Connecticut River. There are numerous obstructions, including hydroelectric dams, both on the Connecticut and the Passumpsic Rivers. The testimony at trial showed that at present there is no way that even a migratory fish such as a salmon could reach the Sleepers River from the Connecticut River with the presence of the existing dams and other obstructions.

ARGUMENT

I

AN OTHERWISE ADEQUATE ENVIRONMENTAL IMPACT STATEMENT PREPARED BY THE VERMONT HIGHWAY DEPARTMENT UNDER THE DIRECTION, GUIDANCE AND SPECIFICATIONS OF THE FEDERAL HIGHWAY ADMINISTRATION AND LATER REVIEWED, REVISED, AND ADOPTED BY THE FEDERAL HIGHWAY ADMINISTRATION CONSTITUTES A "DETAILED STATEMENT BY THE RESPONSIBLE OFFICIAL" WITHIN THE MEANING OF SECTION 102(2)(C) OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, 42 U.S.C. §4332(2)(C)

The District Court found that in preparing the EIS in this case the VHD appears to have faithfully followed the mandate of the revised Policy and Procedure Memorandum (PPM) 90-1 which sets forth guidelines for such preparation. In deciding that preparation by VHD under the direction, guidance and supervision of the local FHWA division office was proper, and in distinguishing this Court's decision in Greene County Planning Board v. Federal Power Commission, 455 F.2d 412, 420 (C.A. 2, 1972), cert. den., 409 U.S. 849, the District Court followed the lead of at least five United States Circuit Courts which have approved of this procedure. Iowa Citizens for Environmental Quality, Inc. v. Volpe, 487 F.2d 849 (C.A. 8, 1973); Citizens' Environmental Council v. Volpe, 484 F.2d 870 (C.A. 10, 1973); Finish Allatoona's Interstate Right, Inc. v. Volpe, 484 F.2d 638 (C.A. 5, 1973); Life of the Land v. Brinegar, 485 F.2d 460 (C.A. 9, 1973) (drawing an analogy

between FHWA procedures and the F.A.A. procedures there followed); Movement Against Destruction v. Volpe, ___ F.2d ___ (C.A. 4, March 19, 1974) (per curiam). Plaintiffs argue, nevertheless, that the District Court erred in its failure to apply the holding in Greene County Planning Board v. Federal Power Commission, 455 F.2d 412 (C.A. 2, 1972), cert. den., 409 U.S. 849, to the very different facts of this case. The thrust of that decision was that the responsible federal agency could not "rubber stamp" an EIS prepared by others. Stated differently, the final responsibility for an EIS and for the decision based thereon is nondelegable and rests with the federal agency.

The procedures codified and followed by FHWA do not amount to the rubber stamp approach rejected in Greene County. The whole tenor of the Federal-Aid Highway Act of 1968, 23 U.S.C. sec. 101 et seq., and the NEPA implementing regulations, PPM 90-1, indicate a close coordination between federal and state authorities in the location, design and approval of federal-aid highways--a cooperative effort. In this case federal participation permeated the entire process; the ultimate decisions to proceed with the project were federal and the final decision on the impact statement was federal.

Since the enactment of NEPA, FHWA, with the specific approval of CEQ[5/] and the knowledge of Congress,[6/] has consistently interpreted the Act as permitting a functional delegation to the VHD. The VHD is required to assemble background information and prepare draft environmental impact statements for submission with original applications for federal approval (see PPM 90-1). Following the circulation of the draft impact statement and the receipt of all comments, the VHD prepares a final EIS which reflects consideration and disposition of all comments. This "final" EIS is forwarded to FHWA which reviews the statement, and modifies it as necessary or, if appropriate, adopts it. During the entire process there is a close liaison between the VHD and the FHWA. At all times the federal agency retains the prerogative to make comments; to require alteration,

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[5/] CEQ has acquiesced in this procedure since the entirety of PPM 90-1 was published in CEQ's official publication, 102 Monitor, Vol. I, No. 9, Oct. 1971, and specifically recognized at Vol. I, No. 10.

[6/] On June 16, 1971, Russell Train, Chairman of the Council on Environmental Quality, testified before the House Subcommittee on Investigations and Oversight and fully apprised this Subcommittee of FHWA's procedure of relying on state agencies for much of the information contained in environmental impact statements. Hearings on Red Tape Before the Subcommittee on Investigations and Oversight of the House Committee on Public Works, 92d Cong., 1st sess., pp. 261-263. See also Hearings Before the Subcommittee on Roads of the Senate Committee on Public Works, 91st Cong., 1st sess., p. 7 (August 25, 1970).

additional research, or re-evaluation; or to reject the statement prepared by the VHD. With the knowledge that the statement is one for which FHWA takes responsibility, it exercises its control prerogative when warranted. In this case, there was significant FHWA participation in the EIS preparation including the continuing involvement of FHWA's local representative, the division engineer and his staff. The record is plain, we submit, that the federal involvement in the preparation and approving of the final EIS was substantial and not merely rubber-stamping.

This process accords with the Guidelines of the Council on Environmental Quality. On August 1, 1973, CEQ promulgated new guidelines for preparation of environmental impact statements. Section 1500.7(d), Councel on Environmental Quality Guidelines, Preparation of Environmental Impact Statements, 38 Fed. Reg. 20550 (1973), provides:

> (d) Where an agency relies on an applicant to submit initial environmental information, the agency should assist the applicant by outlining the types of information required. In all cases, the agency should make its own evaluation of the environmental issues and take responsibility for the scope and content of draft and final environmental statements. (Emphasis added.)

The explanation following the guidelines when proposed specifically states that Section 7(d) was added to allow flexibility in light of the decision in Greene County, supra. CEQ Proposed Guidelines, 38 Fed. Reg. 10865 (1973).

It is well established that an administrative interpretation of a statute by the agency charged with its enforcement is entitled to great deference. Ehlert v. United States, 402 U.S. 99, 105 (1971); Griggs v. Duke Power Co., 401 U.S. 424, 433-434 (1971); United States v. City of Chicago, 400 U.S. 8, 10 (1970); Udall v. Tallman, 380 U.S. 1, 16 (1965). CEQ, the agency charged with implementing and interpreting NEPA, was apprised of and approved FHWA's procedure for complying with NEPA and has formalized its approval in its guidelines.

Furthermore, it is quite clear that Congress was fully aware of FHWA's procedure of requiring state highway departments to physically prepare the environmental impact statements subject to FHWA's acceptance, modification, approval, and adoption (fn. 6, supra). The refusal of Congress to alter an administrative interpretation buttresses that interpretation. N.L.R.B. v. Boeing Co., 412 U.S. 67, 75 (1973); Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 382 (1969); Zemel v. Rusk, 381 U.S. 1, 11-12 (1965); United States v. Bergh, 352 U.S. 40, 46-47 (1956).

In denying an application for a stay pending appeal the Chief Justice of the Supreme Court expressed his view of the intent of NEPA: "The world must go on and new environmental legislation must be carefully meshed with more traditional patterns of federal regulation." Aberdeen & Rockfish R.R., et al. v. S.C.R.A.P., 409 U.S. 1207 (1972). The procedure employed by FHWA simply meshes the mandates of NEPA into the existing framework for planning and building federal aid highways.

II

THE DISTRICT COURT PROPERLY DECLINED TO ISSUE AN INJUNCTION WHEN IT FOUND THAT THE EIS FAILED TO CONSIDER AN ALTERNATIVE WHICH WAS "A VERY REMOTE POSSIBILITY" AND NOT "PROVIDENT OR FEASIBLE"

Having found that the EIS was prepared properly, the District Court went on to evaluate the substantive adequacy of the EIS. The District Court found that the EIS represented a good faith consideration of the environmental factors but did find that it had--in good faith--failed to consider the alternative of not building an interchange with U.S. Route 2 at all. On the basis of the extensive evidence received at the hearing, however, the District Court found that the no-build alternative was not "provident or feasible" and, at best, a "very remote possibility." The District

Court did not, however, substitute its own judgment with respect to the nonfeasibility of this alternative but instead declined to enjoin the project based upon a balancing of all the equities.

First, although the District Court did not do so, based upon all the evidence received at trial, the District Court could have substituted its own judgment for that not expressly stated in the EIS. In Cape Henry Bird Club v. Laird, ___ F.Supp. ___, 5 ERC 1283 (W.D. Va.), aff'd, ___ F.2d ___, 6 ERC 1336 (C.A. 4, 1973), the Court held that an agency need not discuss alternatives which agency experience would indicate are not feasible if such determination is made in good faith. Because the District Court found that the no-build alternative was not feasible, based upon fully litigated facts, there was no need to remand to FHWA to include this alternative in the EIS.

In view of the evidence received by the District Court, it would constitute an abuse of discretion for FHWA to eliminate the Route 2 interchange in favor of other alternatives found to be not provident or feasible.

Furthermore, the District Court properly weighed all the equities of the situation and, following the Supreme Court in Hecht Co. v. Bowles, 321 U.S. 321 (1944), declined

to enjoin the project because the need for the interchange, the immediate requirements for construction, the dangers and expenses of delay, and the likelihood that the EIS would reach the same conclusion persuaded the District Court, in the exercise of its equity jurisdiction, that an injunction was not proper. The Supreme Court has recently held that such a determination by a District Court should be respected and not disturbed "unless plainly the result of an improvident exercise of judicial discretion." Aberdeen & Rockfish R. Co., et al. v. Students Challenging Regulatory Agency Procedures, 409 U.S. 1207, 1218 (1972), quoting from cases there cited. In that case, in which a three-judge District Court decided to stay the enforcement of certain Interstate Commerce Commission orders with respect to railroad rates, Chief Justice Burger, sitting as the D. C. Circuit Justice, declined to vacate the District Court injunction or to stay the injunction pending appeal, because Chief Justice Burger could not find that the District Court abused its discretion in its weighing of the equitable factors involved, even though he disagreed with the District Court's determination.

We suggest that the exercise of discretion in not issuing an injunction here was far less extreme than in other situations where there was an even more obvious technical violation of NEPA yet courts, both trial and appellate, have not enjoined. State of Ohio v. Callaway, 497 F.2d 1235, 1240

(C.A. 6, 1974); Environmental Defense Fund, Inc. v. Armstrong (New Melones Dam), 352 F.Supp. 50 (N.D. Cal. 1972), aff'd, 487 F.2d 814 (C.A. 9, 1973), cert. den., 416 U.S. 974; Environmental Defense Fund, Inc. v. Froehlke (Truman Dam), 477 F.2d 1033, 1037 (C.A. 8, 1973); Conservation Council of North Carolina v. Froehlke, 473 F.2d 664 (C.A. 4, 1973).

III

NEITHER THE RIVER AND HARBOR ACT OF 1899 NOR THE FEDERAL WATER POLLUTION CONTROL ACT AFFORDS A BASIS FOR PLAINTIFFS' SUIT

A. Sections 10 and 13 of the River and Harbor Act of 1899, 33 U.S.C. secs. 403 and 407, afford no basis for relief. - As the district court correctly concluded, any remedy for failure to obtain a permit under those sections is limited to a suit for enforcement by the Federal Government. Insofar as obtaining injunctive relief, as is here sought, we believe this Court's decision in Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81 (1972), is controlling.[7/] Consequently, we do not belabor the point.

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[7] Alameda Conservation Association v. State of Cal., 437 F.2d 1087 (C.A. 9, 1971), cert. den., 402 U.S. 908, relied on by plaintiffs, dealt only with standing, which is not here involved, and is irrelevant. Insofar as it may suggest a contrary view, it is wrong.

In addition, as the District Court correctly found, the Sleepers River is not a navigable river, nor is it a direct tributary of the Connecticut River. There was no attempt to prove any effect on the navigability, or otherwise, of the Connecticut River. Indeed, the only evidence was that any deposit of silt or other matter resulting from channelization, construction, etc., would not even reach the Connecticut River, much less affect it. Consequently, the District Court correctly concluded that the 1899 Act was of no help to plaintiffs.[8/]

B. Failure to give the 60-day notice before suit required by Section 505 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1365, precludes the injunctive relief sought here. - At the outset, we note that, even if the 60-day notice had been given, Section 505 does not authorize this suit. Section 505 provides, insofar as is relevant:

> (a) Except as provided in subsection (b) of this section any citizen may commence a civil action on his own behalf--

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[8] While we agree that the definition of navigable water is considerably broader under the FWPCA, the traditional definition applies under the 1899 Act and, as we show under Point B, infra, any claim under the FWPCA fails for other reasons.

> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, * * *.
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act.
>
> (b) no action may be commenced (1) under section (a)(1) of this section (A) prior to 60 days after the plaintiff has given notice of the alleged violation to the [Environmental Protection Agency], to the state in which the alleged violation occurs, and to any alleged violator of the standard, limitation, or order * * *.
>
> (c) nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the administrator or a state agency).

As is plain from the words of the Act, this "citizens' suit" provision applies only to situations where there is an alleged violation of an effluent standard limitation or an order of the administrator or State with respect to such standard. Here

there is no such alleged violation for the simple reason that there is no effluent standard or order to have been violated. This is true whether we regard the contractor, the State, or the FHWA as the alleged violator. Plaintiffs' contention that a permit should have been sought and obtained and that dredge and fill spoils are considered pollutants under the definition in 33 U.S.C. sec. 1362(b) is thus irrelevant insofar as this suit is concerned. In short, the FWPCA affords plaintiffs no support in any event. Nevertheless we now show that the district court's conclusion on the fatality of failing to give the 60-day notice is correct.

Even if a "citizens' suit" under Section 505 were appropriate here, the plaintiffs have failed to follow the requirement that 60 days' notice be given prior to commencing suit. This requirement is jurisdictional. Insofar as the federal authorities are concerned, Section 505 constitutes a limited waiver of sovereign immunity and, as such, must be strictly construed and the conditions strictly met. United States v. Shaw, 309 U.S. 495 (1940); Soriano v. United States, 352 U.S. 270 (1957).

As the Supreme Court and other courts of appeals have clearly enunciated, it is a well-established judicial principle that, where Congress has provided adequate procedures for judicial review of administrative actions, that procedure must be followed. Whitney Bank v. New Orleans Bank, 379 U.S. 411, 422 (1965); Nader v. Volpe, 466 F.2d 261, 265-267 (C.A. D.C. 1972). Similarly, the most recent cases decided under the citizens' suit provisions of the Clean Air Act and the only cases yet to be decided under the citizens' suit provision of FWPCA have held the 60-day notice requirement to be jurisdictional, a failure to comply deprives the district court of jurisdiction. Charles Pinkney, et al. v. Ohio Environmental Protection Agency, et al., ___ F.Supp. ___ (No. C 73-1159, N.D. Ohio, Jan. 17, 1974) not yet reported; The City of Highland Park, etc., et al. v. Train, et al., ___ F.Supp. ___ (No. 73 C 3027, N.D. Ill., March 15, 1974) not yet reported; City of Ventnor City v. Fri, ___ F.Supp. ___ (No. 1101-73, D. N.J., Mar. 8, 1974) not yet reported; Smoke Rise, Inc., et al. v. Washington Suburban Sanitary Commission, et al., ___ F.Supp. ___ (No. 73-1031, D. Md., Apr. 10, 1974) not yet reported. As the district court noted (Slip Op. 30-31), there is good reason for this condition as it allows the agency to use appropriate action to correct any problems.

Insofar as a complaint that the FWPCA has been violated, Section 505 appears the sole and exclusive method for questioning the action in the District Court. As the Supreme Court stated in Passenger Corp. v. Passengers Assn., 414 U.S. 453, 458 (1974):

> A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." Botany Mills v. United States, 278 U.S. 282, 289 (1929). This principle of statutory construction reflects an ancient maxim--expressio unius est exclusio alterius. Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances, this maxim would clearly compel the conclusion that the remedies created in & 307 (a) are the exclusive means to enforce the duties and obligations imposed by the Act.

The district court was clearly correct in concluding that the failure to give the requisite 60 days' notice was fatal to the suit.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

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SEPTEMBER 1974

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74-2168

THE VERMONT NATURAL RESOURCES COUNCIL, INC., ET AL.,

Appellants

v.

BRINEGAR, ET AL.,

Appellees

CERTIFICATE OF SERVICE

I certify that two reproduced copies of the brief for the federal defendant-appellees have been served on each counsel by placing it in the United States mail, postage prepaid, properly addressed, this 23rd day of September, 1974, to:

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